91-1498

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FRANK ALTAMORE

Petitioner,

v.

NEWSDAY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the State Courts' failure to vacate the arbitration award in issue, on the ground that it is violative of public policy, a federal question, conflicts with decisions of the United States Court of Appeals?

2. Whether the State Courts' failure to vacate the arbitration award in issue, on the ground that it is violative of public policy, a federal question, conflicts with applicable decisions of this Court and established Federal policy?

3. Whether the State Courts' failure to vacate the arbitration award in issue, on the ground that the arbitrator exceeded his authority, conflicts with applicable decisions of this Court?

LIST OF ALL PARTIES

1.	Frank Altamore[1]	Petitioner-Petitioner
2.	Newsday, Inc.	Respondent-Respondent

[1] Petitioner is an individual and therefore there are no parent companies or non wholly owned subsidiaries that need to be disclosed.

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No.

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NEWSDAY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

PETITION FOR CERTIORARI

OPINIONS BELOW

To petitioner's knowledge, previous opinions rendered in this case have not been reported.

JURISDICTION

1. The order of the Court of Appeals of the State of New York, denying discretionary review was entered on December 19, 1991.

2. No rehearing was requested.

3. This Court has jursidiction to review the judgment or decree in question by writ of certiorari pursuant to 28 U.S.C. Section 1257 (a) and Rule 10.1 of the Rules of this Court.

STATUTES INVOLVED

A relevant statute in this case is 42 U.S.C. Section 12101 *et. seq.*

42 U.S.C. Section 12101(a) provides:

> "The Congress finds that -- discrimination against individuals with disabilities persists in such critical areas as employment"

42 U.S.C. Section 12112 (a) provides:

> "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment"

Another relevant statute in this case is Section 7511 of the Civil Practice Law and Rules of the State of New York.

Section 7511 provides:

> "An application to vacate or modify an award may be made by a party within ninety days after its delivery to him."

Section 7511 (b)(1) provides:

> "1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:
>
> (i) corruption, fraud, or misconduct in procuring the award; or

(ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or

(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or

(iv) failure to following the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection."

STATEMENT OF THE CASE

In a letter dated July 30, 1985, Al Mobilio, composing room General Foreman, Newsday, Inc., notified Frank Altamore, a Compositor (Handman) who is the Petitioner herein, that his employment with Newsday was being terminated effective July 31, 1985. In addition, Petitioner was advised that his group health insurance benefits was also being terminated. In support of its dismissal, Newsday stated that it "has been advised by Dr. Housman that you suffer from a permanent disability which precludes your return to employment at Newsday in your previous position." Newsday then continued "Your permanent disability warrants your discharge for cause under the collective bargaining agreement between Newsday and Long Island Typographical Union Local No. 915. Newsday has determined that your employment status will be terminated effective July 31, 1985. One effect of this termination notice is that Newsday will cease making contributions for your group health insurance effective August 1, 1985." Petitioner, it should be noted, was a long standing employee of Newsday with job guarantees. He had been employed by Newsday since on or about July 7, 1970.

In fact, petitioner's long standing employment gave him certain job security rights. These rights are contained in Section 3 of the Collective Bargaining Agreement between respondent and the Long Island Typographical Union Local 915, of which petitioner was a member.

This Section states in relevant part:

> "In consideration of the Union's agreement that the Publisher shall not be restricted with regard to the Introduction and operation of new equipment and processes for the composition of its newspaper and its acceptance of the retirement provision herein, the Publisher agrees that all regular situation holders whose priority date precedes June 10, 1972, (see list Appendix A) will be retained on situations for the remainder of their working life but no longer than the anniversary of his or her 70th date of birth, unless vacating same through retirement, resignation, death, or discharge for cause."

Respondent's determination was rooted in the fact that after seven (7) years of competent service, Petitioner was compelled to take a disability leave due to bacterioendocarditis, which is a blood infection. After several weeks of daily testing and treatment in Nassau Hospital, Petitioner developed a severe problem with his movement, balance and vision. This condition was ultimately diagnosed as severe vertigo. Although, Petitioner's condition periodically improved, he was beset with visual disturbances and headaches between 1977 and 1984. During this time, Petitioner remained on disability and did not work because ***Respondent refused to make allowances for light duty.***

Various doctors who treated Petitioner during this time, concluded that although Petitioner's condition was then disabling, it was not necessarily permanently disabling. However, in 1982 in an attempt to satisfy Respondent's threats, Petitioner supplied it with documentation as to his continuing disability. At that time, Petitioner forwarded a note from one Doctor Harkavy, who was Petitioner's internist. Dr. Harkavy stated with reference to Petitioner "He is totally disabled and cannot work at this time." In 1984, Petitioner supplied Respondent with another note from Dr. Harkavy. This one stated that Petitioner "is totally disabled at this time as a

result of severe constant vertigo." It should be noted that Dr. Harkavy did not render an assessment concerning Petitioner's prognosis as to permanency. Dr. Harkavy recommended that Petitioner visit neurologists Dickman, Mazurek & Marks. Petitioner visited this neurologist on September 12, 1985, May 8, 1986 and October 16, 1986. At no time however did Respondent ever seek to make allowances for Petitioner's condition. Dr. Marks testified at the January 22, 1987 hearing. He testified that Petitioner had made progress and was then able to return to work. Unfortunately, Arbitrator House disregarded this testimony prejudicing Petitioner.

Approximately nine (9) months later, Respondent threatened Petitioner to submit to a complete medical examination by a physician of Respondent's choice. Respondent knowingly that, "No Journeyman shall be required to submit to a physical examination as a condition of employment" under the Collective Bargaining Agreement used the examination wrongly. Respondent thereupon referred Petitioner to Dr. Housman. Dr. Housman concluded that Petitioner could not then engage in an occupation which required him to continously change his field of vision or the position of his head. One (1) week later, at Respondent's request, Dr. Housman supplemented his evaluation. At that time, he provided a note to Respondent which concluded that Petitioner was totally and permanently disabled to perform his duties. It was immediately thereafter that Respondent carried out its threats and furnished Petitioner with the termination notice dated July 30, 1985.

Petitioner and his Union, the Long Island Typographical Union Local No. 915 pursuant to the relevant collective bargaining agreement challenged Respondent who failed to reply. The matter of Petitioner's dismissal was then submitted to arbitration. Pursuant to this request, an arbitration hearing was held before Daniel House, Arbitrator, on May 20, July 29, September 3, September 4, September 30, October 8, October 29, November 5, November 24, December 4, 1986 and January 21 and 22, 1987.

At the outset of the hearing, the parties could not agree upon a stipulated issue. Therefore, the arbitrator ultimately stated that the issue was "Did the Employer violate the Agreement between the parties by unfairly discharging Frank Altamore? If so, what shall be the remedy?"

During the course of the arbitration hearing, at which Petitioner was represented by his own attorney, he alleged that under the relevant provisions of the collective bargaining agreement, an employee such as he, who was protected by job security rights, could not be dismissed because of a medical disability, whether permanent or not. In this vein, petitioner asserted that the medical disability was not one of the causes for which an employee with job security rights could be dismissed under Section 3 of the Collective Bargaining Agreement. Petitioner also argued during the hearing that, in any case, the medical evidence did not support a conclusion that he was permanently disabled. Petitioner also argued that he was a victim of discrimination. Respondent, on the other hand, essentially argued that, in its opinion, Petitioner's disability constituted "neglect of duty" which, under the collective bargaining agreement, it argued gave it the right to dismiss. It should be noted that Respondent's argument represented a departure from its original justification in which it argued that Petitioner was guilty of "incompetence." It should also be noted that there was nothing in the applicable provisions to support Respondent's position that Petitioner's disability constituted "neglect of duty". Respondent and the arbitrator departed from traditional past practices and usages defining "neglect of duty" in order to discriminate against Petitioner. There was also no contractual evidence in support of Respondent's position concerning a prior arbitration involving the parties, the Harry Beal case. In fact, this Decision conflicts with Arbitrator House's award because it protects priority status.

In an award dated April 24, 1987, Arbitrator House ruled "The Employer did not violate the Agreement between the parties by unfairly discharging Frank Altamore." In so concluding, Arbitrator House held "I find from the foregoing that it was proved that the 'non-disciplinary' discharge of Frank Altamore (sic) did not violate the Agreement and was fair: 'neglect of duty' includes being unable to report for and perform any of the normal work which might be available for assignment, even if the disability to do so is not the fault of the grievant." The arbitrator therefore subjected Petitioner to a "no win" situtation. He even omitted actual facts and replaced them with non-factual, self-serving assertions merely to support his determination for Respondent. Arbitrator House prior to the start of one hearing told Respondent to challenge the record because it was damaging their case.

Believing that he was aggrieved, Petitioner, commenced a proceeding, in his own name, pursuant to Article 75 of the Civil Practice Law and Rules of the State of New York, to vacate Arbitrator House's award.

In a memorandum decision dated October 16, 1987, the Honorable Angelo D. Roncallo, Justice of the Supreme Court of the State of New York, dismissed the Petition (A-5). In doing so, Justice Roncallo held that Petitioner "was not a formal party" to the arbitration. As such, Justice Roncallo held that Petitioner did not have standing to maintain this proceeding. Justice Roncallo also held that the Court could not review errors of fact or law made by an arbitrator and render a "decision de novo on the merits". Finally, Justice Roncallo held that Petitioner's arguments were not within the parameters set forth in CPLR Section 7511 (b). This memorandum decision was followed by an Order and Judgement by Justice Roncallo dated November 12, 1987 (A-7).

Petitioner then appealed to the Appellate Division of the Supreme Court of the State of New York, Second Department which transferred the matter to the Appellate Division, Fourth Department. In his appeal, petitioner argued that (1) the lower court erred in determining that he did not have standing to maintain this proceeding; (2) the arbitrator exceeded his authority in rendering the award herein in that it did not draw its essence from the collective bargaining agreement; (3) the award violated the public policy of the United States and the State of New York so as to render it subject to vacatur; and (4) the arbitrator exceeded his authority in rendering the award in that he ignored precedent, custom and practice.

In a Decision dated July 12, 1991, the Appellate Division, Fourth Department unanimously affirmed the lower court's determination (A-3). However, in doing so, the Court held that the "Supreme Court erred in finding that petitioner lacked standing to challenge the arbitrator's award." However, the Court continued "Nonetheless, we conclude that the arbitrator's determination that petitioner was lawfully discharged was not irrational, in excess of his authority or violative or any public policy. Accordingly, it should not be disturbed (citations omitted.)"

In a Notice of Motion dated July 29, 1991, Petitioner moved the Appellate Division, Fourth Department for leave to Appeal to the Court of Appeals of the State of New York. In a Decision and Order dated Ocober 4, 1991 (A-2), the Fourth Department denied Petitioner's motion for leave to Appeal.

In a Notice of Motion dated October 28, 1991, petitioner moved the Court of Appeals of the State of New York for leave to appeal to it. In an Order dated December 19, 1991 (A-1), the Court of Appeals of the State of New York denied petitioner's application for discretionary review. This constituted an exhaustion of petitioner's State judicial remedies. Petitioner now files a Petition for a Writ of Certiorari.

The federal questions raised in this petition were presented to the court of first instance and were rejected by it as was already noted. The issues were repeated at each Appellate level but were similarly rejected. The pertinent quotations of the State courts which confirm that the issues were raised has already been noted.

ARGUMENT

Petitioner respectfully submits that the following discussion will reveal that this Petition should be granted because the State Courts' failure to vacate the arbitration award in issue, on the ground that it is violative of public policy, a federal question, conflicts with decisions of the United States Court of Appeals. In addition, the State Courts' failure to vacate the arbitration award in issue, on the ground that it is violative of public policy, a federal question, conflicts with applicable decisions of this Court and established Federal policy. Finally, the State Courts' failure to vacate the arbitration award in issue, on the ground that the arbitrator exceeded his authority, conflicts with applicable decisions of this Court.

1. It is well established that a court has the power and, indeed, the duty to vacate an arbitrator's decision which violates established public policy. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987); *W.R. Grace & Co. v. Int'l Union of United Rubber Workers, Local 759*, 461 U.S. 757 (1983). The *Misco* Court, in fact, held that a court may refuse to enforce an award wherein the award

would violate some "explicit public policy" that is "well defined and dominant.....ascertained by reference to the laws and legal precedents..." *Id.* at 43, *quoting W.R. Grace*, 461 U.S. at 766.

Petitioner submits that there is a well-defined public policy against discrimination based upon handicapped in the workplace, based on federal law, administrative guidelines, and legal precedents. The arbitrator's decision affirming the respondent's actions in the circumstances present in this case, violates that policy and therefore should be vacated. The arbitrator's decision and the State Courts' ratification of it is in total conflict with the clearly defined federal public policy, as evidenced in statute, regulation, and in decisions of this Court and the United States Court of Appeals which seek to protect disabled persons from discrimination in the workplace. These statutes, regulations and decisions must supersede the arbitration award being contested herein.

In fact, the United States Court of Appeals for the Second Circuit, in a case involving the same parties as herein, recently recognized a Court's authority to vacate an arbitration award on public policy grounds. In *Newsday Inc. v. Long Island Typographical Union No. 915, CWA, AFL-CIO*, 915 F 2d 840 (2nd Cir. 1990), the Second Circuit affirmed the Decision of the District Court which had reversed an arbitration award reinstating an employee. In this case, the Court held "A court may refuse to enforce an arbitrator's award under a collective bargaining agreement if the award is contrary to public policy." The same result must ensue herein.

Petitioner asserts that an application of these principles to the fact and circumstances of this proceeding clearly established that his dismissal not occur. We will remember that petitioner was dismissed because of a disability and was denied a light duty assignment which other employees had been afforded. The arbitrator held that this disability constituted "neglect of duty", although petitioner had been on the job security list. Petitioner respectfully submits that this award is directly contrary to statute and regulation and is therefore violative of the federal public policy as evidenced in statute, regulation and prior decision. This is an issue of public importance and the ends of justice. As such, the review of this Court is appropriate.

A strong federal policy against discrimination of the disabled in the workplace is deeply rooted in Federal law. There are several Federal statutes which confirm this policy.

The Rehabilitation Act of 1973, 29 U.S.C. Section 701 *et. seq.* is one. 29 U.S.C. Section 794 provides in relevant part:

> "No otherwise qualified individual with handicaps in the United States, as defined in Section 706 (8) of this title, shall solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by an Executive agency or by the United States Postal Service."

This policy was expanded upon in the Americans with Disabilities Act of 1990, 42 U.S.C. Section 12101 *et. seq.*

Section 12101 (a) provides:

> "The Congress finds that -- discrimination against individuals with disabilities persists in such critical areas as employment"

42 U.S.C. Section 12112 (a) provides:

> "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment"

29 C.F.R. Section 1615.101 *et. seq.* also expresses this clearly defined public policy protecting the rights of the disabled in the workplace.

This argument becomes even more glaring when one realizes that during the arbitration it was revealed that other disabled employees

were not dismissed by respondent. Thus, petitioner was even a more blatant victim of unlawful discrimination because of his age and disability.

In fact, Respondent has a long history of not dismissing disabled employees, whether permanently disabled or not. For example, an employee Czeslaw Muszynski enjoyed the benefits of the same collective bargaining agreement. Mr. Muszynski, although disabled, continues to enjoy all benefits although considered "inactive". Other employees including Edward Willet, Harry Beal, Harry O'Neil and Karen Krawchuk, are all disabled employees who continue to enjoy full benefits while in an inactive status. Other individuals who in the past received such consideration were Chester Brown, William Chapman, Salvatore Laurice and Albert Mobilio.

Obviously, Respondent met its public policy obligation to these people. Petitioner is entitled to the same treatment. ***He is the only one who did not receive it.*** Instead, Respondent from day one continously targeted Petitioner with threatening conduct. No other employee had to endure such threats. For example, as we have seen, Respondent made no allowance for light duty and instead of requesting information from Petitioner, continually threatened him with discharge. Ultimately, Respondent dismissed petitioner, despite his presence on the job security list. The record established that disabled employees, whether permanent or temporary were not discharged. Only petitioner was discharged because of discrimination by respondent and the arbitrator.

The requirement that an employee be able to show that he was otherwise qualified was met in this case. Not only were other disabled job guaranteed employees permitted to retain their security rights under similar circumstances; but petitioner's mere placement on the job security list insured that a physical disability would not render him unqualified. Again, it must be emphasized, that no other employee has been treated in the manner in which Petitioner was treated.

Thus, the fact that the arbitrator and the State Courts condoned petitioner's dismissal was in violation of clearly defined public policy protecting the rights of disabled in the workplace, as

established by Federal statute, regulation and decision. The result was that the State Court decisions conflicted with decisions of United States Court of Appeals and of this Court concerning the ability to vacate an award based upon public policy grounds and conflicted with the strong national policy against discrimination of the disabled in the workplace. The result was that the State Courts' decisions compelled the commission of an unlawful act; to wit: the discharge of an individual because of a disability.

2. It has long been held that an award may be vacated where the Arbitrator has exceeded his/her authority. Perhaps the leading case on this point is *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960). There the Court held:

> "(A)n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's awards manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

In other words, an arbitrator may not impose a remedy which directly contradicts the express language of the collective bargaining agreement.[2] Arbitrators may not ignore the requirements of the collective bargaining agreement in order to "dispense their own brand of industrial justice." Where, as here, an arbitrator attempts to do so, it is appropriate for the court to vacate an award.

The Circuit courts have uniformly approved vacatur of awards that exceed that authority conferred upon the arbitrator by the contract, or that do not draw their essence from the collective bargaining agreement, or that are not supported by the record evidence. *Office and Professional Employees International Union, Local 2 v. Washington Metropolitan Area Transit Authority*, 724 F. 2d 133 (D.C. Cir. 1983); *Butterkrust Bakeries v. Bakery Conf. & Tobacco Workers.*, 726 F. 2d 698 (11th Cir. 1984); *Detroit Coil Co. v. IAM*,

594 F. 2d 575 (6th Cir. 1979), *cert. denied; Monogahela Power Co. v. Local 2332, IBEW*, 566 F. 2d *1966* (4th Cir. 1976); *Torrington Co. v. Metal Products Workers Union Local 1645;* 362 F. 2d 677 (2d Cir. 1966); *Truck Drivers & Helpers Union Local 784 v. Ulry-Talbert Co.*, 330 F. 2d 562 (8th Cir. 1964). Similar result should follow in the instant matter.

These cases tell us that the State Courts' decisions in the instant matter concerned the decision of a federal question in a way that conflicts with applicable decisions of this Court and of the United States Courts of Appeal.

In conducting an analysis of this issue, we must consider the interrelationship between the collective bargaining agreement and the General Laws of the International Typographical Union. We shall first consider the relevant provisions of the collective bargaining agreement.

As we have seen, Section 3 of the collective bargaining agreement between Respondent and the Long Island Typographical Union relates to job security. It states in relevant part that Newsday:

> "agrees that all regular situation holders whose priority date precedes June 10, 1972 ...will be retained on situations for the remainder of their working life but no longer than the anniversary of his or her 70th date of birth, unless vacating same through retirement, resignation, death or discharge for cause."

Since Petitioner commenced his employment prior to June 10, 1972, he falls within the parameters of this job security clause. Thus, Respondent, under the circumstances of this case, could only discharge Petitioner if his disability constituted "neglect of duty" and if "neglect of duty" constitutes sufficient "cause".

Section 13 of the collective bargaining agreement states that the foreman shall have the right to discharge for "neglect of duty". Article II, Section 3 of the aforesaid General Laws also states that the foreman may discharge an employee for "neglect of duty".

However, neither these sections nor any other provision of the collective bargaining agreement and the General Laws define "neglect of duty". We must then look deeper in order to determine what if any authority is rooted in either the collective bargaining agreement or the General Laws or the past practice and usage to address the arbitrator's determination.

The answer is found in the General Laws. Firstly, it should be noted that the General Laws, which are nationally consistent within the industry, are totally applicable to the collective bargaining agreement and, in fact, should be considered a part thereof. Section 8 of the collective bargaining agreement states: "It is understood and agreed that the General Laws of the International Typographical Union, in effect at time of signing of the Agreement...which are not in conflict with law or with the Agreement, shall govern relations between the parties on conditions and matters not specifically covered herein."

Although, nothing defines "neglect of duty", Article V, Section 6 of the General Laws states that employees "incapacitated by illness, shall not suffer loss of situation or priority standing while so employed or incapacitated....". This provision does not distinguish between a temporary disability and a permanent disability.

This paragraph and past practice and usage which is deeply enrooted and which is consistent with the basic premise that "neglect of duty" can only occur through affirmative conduct or active employment. A non-disciplinary reason such as a disability cannot constitute "neglect of duty".

Thus, because, as we have seen, there is no definition of "neglect of duty" or any provision authorizing dismissal of an employee under a disability, whether permanent or temporary, Article V, Section 6 must control with the underlining past practices and usage. As such, Petitioner, being disabled, could not have been properly dismissed.

Therefore, petitioner asserted that the arbitrator in determining that Petitioner should be dismissed rewrote the agreement that

Respondent and the Union had agreed to. Under these circumstances, the arbitrator exceeded his authority and executed the award in an imperfect fashion discriminating against Petitioner.

In summary, the foregoing discussion has revealed that this Petition should be granted because the State Courts' failure to vacate the arbitration award in issue, on the ground that it is violative of public policy, a federal question, conflicts with decisions of the United States Court of Appeals. In addition, the State Courts' failure to vacate the arbitration award in issue, on the ground that it is violative of public policy, a federal question, conflicts with applicable decisions of this Court and established Federal policy. Finally, the State Courts' failure to vacate the arbitration award in issue, on the ground that the arbitrator exceeded his authority, conflicts with applicable decisions of this Court.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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By: ALAN E. WOLIN, ESQ.

APPENDIX

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of December A.D. 1991

Present, Hon. Sol Wachtler, *Chief Judge, presiding.*

4-10 Mo. No. 1257
In the Matter of Frank Altamore,

Appellant,

v.

Newsday, Inc.,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Donald M. Sheraw
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

Motion No. 763/91

PRESENT: DENMAN, J.P., GREEN, BALIO, DAVIS, JJ.

MATTER OF FRANK ALTAMORE, APPELLANT,

V.

NEWSDAY, INC., RESPONDENT.

The above-named appellant having moved for reargument or in the alternative, leave to appeal to the Court of Appeals from the order of this Court entered July 12, 1991, and respondent having cross-moved for certain relief,

Now, upon reading and filing the affidavit and affirmation of Alan E. Wolin sworn to and dated July 30, 1991 and August 29, 1991, the notice of motion with proof of service thereof, the opposing affidavit and affirmation of Amber Kagen sworn to and dated August 21, 1991 and September 3, 1991, the notice of cross motion with proof of service thereof, and due deliberation having been had thereon,

It is hereby ORDERED That, the motion be, and the same hereby is denied, and

It is further ORDERED That, the cross motion be, and the same hereby is denied.

Entered: October 4, 1991 CARL M. DARNALL, Clerk

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

Motion No. 763/91

PRESENT: DENMAN, J.P., GREEN, BALIO, LOWERY, DAVIS, JJ.

MATTER OF FRANK ALTAMORE, APPELLANT,

V.

NEWSDAY, INC., RESPONDENT.

The above-named Frank Altamore having appealed to this court from the judgment of the Supreme Court, entered in the Nassau County Clerk's office on November 12, 1987, and said appeal having been submitted by Alan Wolin of counsel for appellant, Bradford Coupe of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be the same hereby is unanimously afffirmed.

Memorandum, which is hereby made a part hereof.

Entered: July 12, 1991 CARL M. DARNALL, Clerk

763. (Nassau Co.) -- MATTER OF FRANK ALTAMORE, APPELLANT V. NEWSDAY, INC., RESPONDENT. -- Judgment unanimously affirmed without costs. Memorandum: Supreme Court erred in finding that petitioner lacked standing to challenge the arbitrator's award (*see*, Matter of Diaz v. Pilgrim State Psychiatric Center of State of N.Y., 62 NY2d 693, 695). Nonetheless, we conclude that the arbitrator's determination that petitioner was lawfully discharged was not irrational, in excess of his authority or violative of any public policy. Accordingly, it should not be disturbed (*see*, Matter of Albany County Sheriff's Local 775 of Council 82, AFCSME, AFL-CIO (County of Albany), 63 NY2d 654, 656; Matter of Local Div. 1179, Amalgamated Tr. Union, AFL-CIO (Green Bus Lines), 50 NY2d 1007, 1009; Rochester City School Dist. v. Rochester Teachers Assn., 41 NY2d 578, 582-583; Matter of Board of Education of Dover Union Free School Dist. v. Dover-Wingdale Teachers' Assn., 95 AD2d 497, 501-502, *affd* 61 NY2d 913).

We have reviewed the other issues raised by petitioner and find them to be without merit. (Appeal from Judgment of Supreme Court, Nassau County, Roncallo, J. - Arbitration.) PRESENT: DENMAN, J.P., GREEN, BALIO, LOWERY, DAVIS, JJ.

MEMORANDUM

SUPREME COURT. NASSAU COUNTY

In the Matter of the Application of FRANK ALTAMORE,

Petitioner,

For a Judgment Pursuant to Article 75 of the Civil Practice Law and Rules,

- against -

NEWSDAY, INC.,

Respondent.

IAS, PART IX (10/9/87)

BY ANGELO D. RONCALLO

DATED OCTOBER 16, 1987
INDEX #13787/1987

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170 Old Country Road
Mineola, N.Y. 11501

MORGAN, LEWIS & BOCKIUS
Attorney for Respondent
101 Park Avenue
New York, N.Y. 10178

Petitioner initiates this proceeding pursuant to Article 75 of the CPLR seeking to vacate the opinion and award of the arbitrator, which upheld the dismissal of Petitioner from his inactive employment with respondent, NEWSDAY, INC. The petition is dismissed accordingly.

The arbitration proceeding leading to the award was brought by L.I. Typographical Union Local 915 pursuant to a collective bargaining agreement between Newsday and the Union.

Petitioner was the grievant in said proceeding; he was not a formal party; Newsday and the Union were the only parties to the contract on which the arbitration was predicated.

An arbitration award rendered pursuant to such an agreement may be vacated only at the instance of one of those two parties

(Matter of Soto (Goldman), 7 NY 2d 397; *Chupka* v. *Lorenz-Schneider Co., Inc.*, 12 NY 2d 1).

This Court has no authority to review errors of fact or law made by an arbitrator, and render a decision de novo on the merits *(Integrated Sales, Inc.* v. *Maxell Corporation of America*, 94 AD 2d 221; *W.M. Girvan, Inc.* v. *Robilotto*, 40 AD 2d 1060; *Matter of Raisler Corporation*, 32 NY 2d 274).

CPLR 7511 (b) sets forth the grounds for vacating an award when the application is made by a party who participated in the arbitration. Four grounds are enumerated: (1) corruption, fraud or misconduct in procuring the award, (2) partiality of the arbitrator, (3) the arbitrator exceeded his power or imperfectly executed it, and (4) failure to follow the procedures specified in Article 75 *(Matter of Torano and Motor Vehicle Accident Indemnification Corporation*, 19 AD 2d 356; *Matter of Board of Education* v. *Dover-Wingdale Teachers' Assocaiton*, 95 AD 2d 497; *Matter of Pierre and General Accident Insurance*, 100 AD 2d 705; Matter of Raisler Corporation, supra).

Settle judgment on notice.

J.S.C.

At an IAS Part of the Supreme Court of the State of New York, held in and for the County of Nassau, at the Courthouse located at 100 Supreme Court Drive, Mineola, New York on the 12th day of November, 1987

PRESENT: Hon. Angelo D. Roncallo

In the Matter of the Application of FRANK ALTAMORE,

Petitioner,

For a Judgment Pursuant to Article 75 of the Civil Practice Law and Rules,

- against -

NEWSDAY, INC.,

Respondent.

Index No. 13787/1987

ORDER AND JUDGMENT

Petitioner Frank Altamore ("Petitioner") by his attorneys, Jack B. Solerwitz, having moved by Order to Show Cause dated July 21, 1987 for an Order pursuant to Article 75 of the Civil Practice Law and Rules vacating the opinion and award of Arbitrator Daniel House which upheld the dismissal of petitioner from his inactive employment with Respondent Newsday, Inc. ("Newsday") and Newsday having filed the affidavit of James D. Madigan III and Memorandum of Law in Opposition to the Petition seeking dismissal of the petition;

NOW, upon reading and filing the Petition dated July 21, 1987 with exhibits annexed thereto, and the affidavit of James D. Madigan III, sworn to on October 6, 1987 with exhibits annexed thereto, and the Memorandum of Law in Opposition to the Petition, all in opposition to Petitioner's motion; and due deliberation having been had thereon, and the Court having duly made its decision on October 16, 1987;

NOW, it is

ORDERED AND ADJUDGED, that Newsday's application for dismissal of the petition is hereby granted in all respects and judgment is hereby awarded in favor of Newsday and against petitioner dismissing the petition on the merits with prejudice.

_____

J.S.C.

Addresses of the Parties

Newsday, Inc.
235 Pine Lawn Road
Melville, N.Y. 11747

Frank Altamore
38 Vincent Place
Lynbrook, N.Y. 11563

STATE OF NEW YORK)
COUNTY OF NASSAU) SS:

Jill Ann Mackie being duly sworn, deposes and says:

Deponent is not a party to the action, is over the age of 18 years and resides at Massapequa, New York.

That on the 13th day of March ,1990, deponent served the within Order and Judgment with Notice of Entry

Upon: Morgan Lewis & Bockius
101 Park Avenue
New York, N.Y. 10178

The address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service with the State of New York.

Jill Ann Mackie

Sworn to before me this
13th day of March, 1990.

Alan E. Wolin

NOTARY PUBLIC